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No. 07-1575

Supreme Court, U.S.
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In The

Supreme Court of the United States

PHILLIP R. NEELY,

Petitioner,

v.

CITY OF RIVERDALE, IRIS JESSIE, THETUS A. KNOX, T. MICHAEL MARTIN and WANDA WALLACE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the pretext standard as set forth by the United States Court of Appeals for the Eleventh Circuit in *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1994), is consistent with the pretext standard established by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)?

II. Whether a pretext analysis focusing on an employer's beliefs and perceptions regarding an employee's performance is consistent with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)?

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OPINIONS BELOW

The decision of the United States District Court for the Northern District of Georgia granting summary judgment is unreported. (Petitioner's Appendix ("Pet. App.") D). The decision of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's grant of summary judgment is unreported. (Pet. App. B).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on October 17, 2007. (Pet. App. B). The Eleventh Circuit then entered an order denying petitioner's motion for rehearing on January 14, 2008. (Pet. App. A). Petitioner initially attempted to file his petition for writ of certiorari on or about April 14, 2008.[1] The Clerk of this Court rejected the petition by letter dated April

[1] The Clerk of this Court rejected petitioner's initial petition for a writ of certiorari because the petition did not comply with this Court's Rules. Petitioner now has re-filed his petition, but he has not complied with SUP. CT. R. 12(b)(3) in that he has failed to notify respondents of the date of filing, the date the case was placed on the docket, and the docket number of the case. In fact, when plaintiff served respondents with a copy of his petition, he attached an undated letter notifying respondents that the petition had been successfully filed with the Clerk of this Court. Of significance, the letter did not indicate the date of filing, the date the case was placed on the docket, or the docket number.

18, 2008. Petitioner filed a petition for writ of certiorari (amended) on or about June 16, 2008. Accordingly, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. 42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

2. 42 U.S.C. § 2000e-3(a)

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Phillip R. Neely ("Petitioner"), an African-American male, was hired by the City of Riverdale ("the City") as a police officer in 1998. (Pet. App. E at E9). In 2002, then-police chief Mike Edwards, promoted petitioner to the rank of police captain.[2] (*Id.*).

On or about July 2, 2004, defendant T. Michael Martin issued a three-day suspension to petitioner for violation of police department rules. (*Id.* at E11). On September 27, 2004, the city hired defendant Thetus Knox, an African-American woman, as the new police chief. (*Id.* at E11). At that time, petitioner held the rank of captain. (*Id.* at E11).

In November 2004, the City posted a vacancy for the position of assistant police chief. (*Id.* at E12). Plaintiff applied for the position but was rejected by Chief Knox because his personnel record indicated that petitioner previously had been suspended for three days in July 2004. (*Id.* at E12). In addition, Chief Knox testified that Major Raymond Spivey informed her that petitioner had been suspended for three days during the preceding twelve months and that she did not independently verify this information. (*Id.* at E31). Upon learning that he was ineligible for a promotion, **petitioner withdrew himself**

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[2] The City police chief has complete authority to promote an individual to the rank of captain or above, and the chief can reclassify (or remove) the higher rank at any time and for any reason. (*Id.* at E10).

from consideration and did not otherwise challenge Chief Knox's conclusion that he was ineligible for a promotion to assistant police chief. (*Id.* at E12-13).

The City assembled an independent panel of police chiefs to conduct interviews and select the new assistant police chief. (*Id.* at E13). The panel unanimously ranked Samuel Patterson, an African-American male, as the top-ranked candidate, and Chief Knox accepted the panel's recommendation to hire Patterson as assistant police chief. (*Id.* at E13).

In the meantime, Chief Knox adopted a department-wide plan to restructure and reorganize departments, tasks, and supervisors. (*Id.* at E16). Additionally, Chief Knox's restructuring plan included promotions and demotions. (*Id.* at E17). On March 2, 2005, both petitioner and Bobby Jones, a Caucasian male, were demoted from the rank of captain to the rank of sergeant. (*Id.* at E17). Petitioner's pay was not reduced as a result of the reclassification. Chief Knox selected petitioner for demotion because she believed that the rank of sergeant was commensurate with petitioner's demonstrated performance. (*Id.* at E41). She did not believe petitioner to be supportive of her leadership, he undermined her authority, challenged her decisions, and, therefore, she used her complete discretionary authority to reclassify him to sergeant. (*Id.* at E10, E41).

Thereafter, petitioner, through counsel, filed the instant lawsuit against the City, Iris Jessie, Thetus

Knox, T. Michael Martin, and Wanda Wallace (collectively "the respondents"). (*Id.* at E5). Petitioner alleged discrimination based on race and gender and retaliation for having filed charges with the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1991, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). (*Id.* at E5). Additionally, petitioner maintained that his rights under the First and Fourteenth Amendments to the United States Constitution had been violated. (*Id.* at E5).

On April 10, 2006, respondents Iris Jessie, Thetus Knox, T. Michael Martin, and Wanda Wallace filed a motion for summary judgment. (*Id.* at E1). On the same day, the City filed a separate motion for summary judgment. (*Id.* at E1-2). On June 1, 2006, Jessie, Martin and Wallace filed a motion for sanctions based on the frivolous nature of his claims pursuant to Fed. R. Civ. P. 11. (*Id.* at E2).

On February 13, 2007, a Magistrate Judge issued a 64-page Report and Recommendation ("R & R") recommending that the district court grant the respondents' motions for summary judgment and sanctions. (See Pet. App. E). The Magistrate Judge concluded that petitioner failed to prove respondents' legitimate non-discriminatory reason for hiring Patterson to assistant police chief amounted to pretext. (*Id.* at E30-32). Citing *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001), the Magistrate Judge determined, *inter alia*, that regardless of

whether the City actually suspended petitioner pursuant to the July 2, 2004 order, petitioner failed to show that Chief Knox did not believe that petitioner had been suspended and was therefore ineligible for promotion. (*Id.* at E31). The Magistrate Judge further found that petitioner could not show that respondents' legitimate nondiscriminatory reasons for not promoting petitioner to captain and demoting petitioner to the rank of sergeant were pretextual. (*Id.* at E33-43).

On March 29, 2007, the district court overruled petitioner's objections, adopted the magistrate's R & R, and granted summary judgment in favour of the respondents. (See Pet. App. C & D). The district court concluded, *inter alia*, that the evidence did not create a question of fact as to whether Chief Knox actually believed that petitioner was ineligible for promotion to assistant police chief because of a previous suspension. (Pet. App. D at D6-8). Additionally, the district court rejected petitioner's failure to promote to captain claim because petitioner failed to rebut evidence showing those promoted expressed a willingness to work with Chief Knox but petitioner did not. (*Id.* at D8-10). Similarly, regarding petitioner's claim of discriminatory and retaliatory demotion, the district court concluded that petitioner failed to create an issue of fact with regard to pretext because his evidence merely questioned the wisdom of the decision but did not show that the decision was based on discrimination or retaliation. (*Id.* at D10-11). Finally, the district court rejected petitioner's remaining claims

and imposed sanctions pursuant to Fed.R.Civ.P. 11. (*Id.* at D62-63).

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On October 17, 2007, the Eleventh Circuit affirmed without discussion the district court's order granting summary judgment in favor of respondents. (Pet. App. B). Petitioner then filed a petition for rehearing and rehearing en banc, which the 11th Circuit summarily denied on or about January 14, 2008. (Pet. App. A).

ARGUMENT

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII also makes it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . " 42 U.S.C. § 2000e-3(a). Absent direct evidence of intentional discrimination, a plaintiff may show intentional discrimination through circumstantial evidence by utilizing the analytical framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). Under the *McDonnell Douglas* framework, a plaintiff must first

establish, by a preponderance of the evidence, a "*prima facie*" case of racial discrimination. *Id.* at 802, 93 S.Ct. at 1824. Under *McDonnell Douglas*, "[e]stablishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094 (1981).

If the plaintiff satisfies this initial burden, the burden shifts to the defendant to proffer a legitimate, non-discriminatory reason for the adverse employment action. *Id.*, 101 S.Ct. at 1094. If the defendant produces sufficient evidence to support a non-discriminatory explanation for its decision, the inference of discrimination is rebutted and the plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination or retaliation. *Id.* at 256, 101 S.Ct. at 1095.

A plaintiff may succeed in demonstrating pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*, 101 S.Ct. at 1095. Notably, the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." *Id.* at 255 n.10, 101 S.Ct. at 1095 n.10.

As this Court has made clear, the ultimate question is whether the employer intentionally discriminated, and the fact that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524, 113 S.Ct. 2742, 2756 (1993). Stated differently, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* at 519, 113 S.Ct. at 2754 (alterations omitted).

This Court has recognized that there may be occasions when the factfinder can infer the ultimate fact of discrimination from the falsity of the employer's explanation. *See id.* at 511, 113 S.Ct. at 2749. In *St. Mary's*, this Court held that:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, . . . [and] upon such rejection, no additional proof of discrimination is required.

Id. at 511, 113 S.Ct. at 2749. This Court reaffirmed this proposition in *Reeves*, holding that "a plaintiff's *prima facie* case, combined with sufficient evidence to

find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000). This Court cautioned, however, that such a showing by a plaintiff will not always be adequate to support a finding of unlawful discrimination, such as when the record reveals some other non-discriminatory reason for the decision. *Id.*, 120 S.Ct. at 2109.

As an initial matter, petitioner maintains that this Court has not yet determined whether a plaintiff's *prima facie* case of retaliation, combined with sufficient evidence to find that the employer's asserted justification was false, may permit a fact-finder to conclude that the employer unlawfully retaliated against the plaintiff based on his participation in protected activity under Title VII. (Pet. at 8-9). It is true that *Reeves* and *St. Mary's* both involved claims of employment discrimination, as opposed to retaliation. Nevertheless, respondents submit that this Court already has recognized implicitly the applicability of *Reeves* and *St. Mary's* to a claim of unlawful retaliation under Title VII. *See Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71, 126 S.Ct. 2405, 2417 (2006).

I. The pretext standard as set forth by the United States Court of Appeals for the Eleventh Circuit in *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1994), is consistent with the pretext standard established by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000).

Petitioner contends that the pretext standard established by the Eleventh Circuit in *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1994), is inconsistent with the pretext standard as set forth by this Court in *Reeves*.[3] Respondents submit that petitioner's contention is completely without merit as he is merely attempting to fashion a mythical inconsistency out of thin air.

In *Hairston*, a case involving the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*, the Eleventh Circuit, citing *McDonnell Douglas*, held that a plaintiff may succeed at the pretext stage "by directly persuading the court at

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[3] Although not entirely clear, it appears that petitioner contends that the pretext standards applied by both the Eighth Circuit in *McCullough v. Real Foods, Inc.*, 140 F.3d 1123 (8th Cir. 1998) and the Eleventh Circuit in *Hairston* are inconsistent with the pretext standard in *Reeves*. Since *Hairston* is entirely consistent with this Court's ruling in *Reeves*, these respondents take the position that there is no circuit split regarding this issue. To that end, this brief does not address whether *McCullough* applies the proper pretext standard as the Eighth Circuit's standard is irrelevant to the current case.

trial that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 9 F.3d at 920. The Eleventh Circuit further held that, in order to establish pretext, a plaintiff is not required to introduce evidence beyond that already offered to establish the *prima facie* case, although the evidence submitted in support of the *prima facie* case may be considered. *Id.*

Like *Reeves*, the Eleventh Circuit's holding in *Hairston* recognizes that disbelief of the employer's proffered reason, coupled with evidence already introduced to establish the *prima facie* case, may be enough for a plaintiff to show pretext. Indeed, petitioner himself acknowledges that the Court in *Hairston* held that a "plaintiff [is] not required to introduce evidence beyond that already offered to establish a *prima facie* case to show pretext." (Pet. at 10). Respondents therefore submit that, notwithstanding petitioner's contentions to the contrary, no incongruity exists between the Eleventh Circuit's decision in *Hairston* and this Court's holding in *Reeves*.

In the instant case, both the district court and the Eleventh Circuit applied the proper pretext standard, and petitioner's suggestion that there was a legal error below is simply without merit. The defendants presented legitimate, nondiscriminatory reasons for its employment actions. Specifically, the defendants demonstrated, *inter alia*, that (1): Chief Knox believed that petitioner had been suspended,

thus making petitioner ineligible for a promotion to assistant police chief; (2) petitioner was demoted to the rank of sergeant as part of Chief Knox's restructuring plan because he was not supportive of her authority and leadership and did not possess the qualifications she required; (3) at the time that petitioner was demoted to sergeant, another African-American male was promoted; and (4) petitioner was not a team player, thereby precluding a promotion to the rank of captain. (*See* Pet. App. E). The district court, applying the proper legal standard, found that petitioner failed to demonstrate that the defendants' proffered reasons were unworthy of credence, and the record evidence supports the district court's conclusion. (*Id.*).

In contrast, as the district court held, petitioner merely questioned the wisdom of the respondents' decisions but failed to show that the decisions were based on discrimination or retaliation. Nevertheless, petitioner maintains that he was not suspended and that he was more qualified for the positions of captain and assistant police chief than those who actually were selected. As *Reeves* makes clear, however, an employer may make an employment decision for any reason at all, even a decision based on erroneous facts, so long as the employment decision is not motivated by the intent to discriminate based on a protected ground. 530 U.S. at 141. Having produced evidence demonstrating legitimate, nondiscriminatory reasons for its employment decisions, the burden fell on petitioner to demonstrate that the respondents'

proffered reasons were false or unworthy of credence. Petitioner failed to satisfy this burden, and he presented no other evidence that would support the conclusion that the respondents' actions were motivated by racial animus particularly in light of the fact that the ultimate decision-maker, Thetus Knox, is African-American. Accordingly, the district court properly granted summary judgment in favour of respondents and the Eleventh Circuit properly affirmed.

II. The District Court's evaluation of the employer's beliefs and perceptions regarding an employee's performance is consistent with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000).

Citing *Cofield v. Goldkist, Inc.*, 267 F.3d 1264 (11th Cir. 2001), petitioner argues that the Eleventh Circuit's pretext analysis, by focusing on the employer's beliefs and perceptions regarding the employee's performance, places a higher burden of proof on a plaintiff than is required by *Reeves*. (Pet. at 13-14). According to petitioner, rather than focusing on the employer's beliefs and perceptions regarding the employee's performance, the court should have instead focused on whether the evidence shows that the employer's proffered reason was false. (*Id.* at 14).

In *Cofield*, a female employee was denied a promotion and brought an action against her employer alleging race and sex discrimination under the

ADEA and Title VII. 267 F.3d 1264. After the employer asserted a legitimate, nondiscriminatory reason for not promoting Cofield, she maintained that the employer's proffered reason was pretextual because she was more qualified for the position than Bowen, the younger male employee who actually received the promotion. *Id.* at 1268. The Eleventh Circuit held that Cofield could not establish pretext simply by showing that she was more qualified than Bowen. *Id.* Rather, the Eleventh Circuit instructed that the pretext inquiry centers upon the employer's beliefs and not the employee's own perceptions of her performance. *Id.* Accordingly, the Court held that "[t]he relevant inquiry for us, then, is not to judge which employee was more qualified, but to determine whether any disparity between Bowen's and Cofield's managerial qualifications is so great that a reasonable fact-finder could infer that [the employer] did not believe Bowen to be better qualified." *Id.*

Respondents submit that any purported inconsistency between the Eleventh Circuit's decision in *Cofield* and this Court's holding in *Reeves* is illusory. As noted above, a plaintiff may succeed in demonstrating pretext by showing that the employer's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. The Eleventh Circuit, by focusing on the employer's beliefs and perceptions regarding the employee's performance, is entirely consistent with this standard.

Indeed, an inquiry into the employer's beliefs regarding the subject employee is essential in

evaluating whether the employer's proffered reasons were false or unworthy of credence. As such, plaintiff's contention that the Eleventh Circuit's inquiry into the employer's beliefs and perceptions places a higher burden of proof on a plaintiff than is required by *Reeves* is without merit. Moreover, by focusing on the employer's perceptions and belief's regarding the employee's performance, the Eleventh Circuit's pretext analysis is designed to answer the ultimate question in issue – that is, whether the plaintiff has proven that the employer purposefully discriminated or retaliated against the employee based on a protected ground. *St. Mary's*, 509 at 524, 113 S.Ct. at 2756.

Additionally, petitioner asserts that, with respect to his failure to promote to assistant police chief claim, the district court and Eleventh Circuit overlooked the evidence supporting his *prima facie* case and his contention that Chief Knox was not worthy of belief. (Pet. at 15). Petitioner's contentions are without merit, as the Magistrate Judge and district court issued well-reasoned decisions that examined the evidence submitted in great detail.

The district court observed that Chief Knox believed plaintiff had been suspended for three days during the preceding twelve months and petitioner had failed to show otherwise. (Pet. App. E at E9 & E31). To that end, Chief Knox notified petitioner that he was ineligible for promotion. (*Id.* at E12). Incredibly, petitioner removed himself from consideration yet still claimed that he deserved a promotion and was

denied said promotion because of his race. (Id. at E12-13). Moreover, petitioner conveniently ignored the fact that the person ultimately hired as assistant police chief is an African-American. Accordingly, after noting that petitioner failed to show that he attempted to correct Chief Knox's alleged misconception about his suspension, the district court properly rejected petitioner's frivolous claim. (Id. at E31).

Thus, far from ignoring the evidence submitted by petitioner, both the Magistrate Judge and district court analyzed the evidence in great detail and determined that petitioner could not show that respondents' legitimate, nondiscriminatory reasons for not promoting petitioner to assistant police chief were pretextual. The district court properly concluded that the undisputed testimony from Chief Knox showed that she believed petitioner had been suspended and that, as a result, petitioner was ineligible for a promotion.

Petitioner failed to present any evidence showing that Chief Knox was motivated by a discriminatory or retaliatory intent. Again, the central inquiry is whether the plaintiff has proven that the employer purposefully discriminated or retaliated against the employee based on a protected ground. *St. Mary's*, 509 at 524, 113 S.Ct. at 2756. Absent such evidence, the district court and the Eleventh Circuit properly concluded that petitioner failed to show that Chief Knox's reasons for not promoting him were pretextual.

CONCLUSION

Despite petitioner's contentions to the contrary, the pretext standard as set forth by the Eleventh Circuit in *Hairston* is entirely consistent with the pretext standard utilized by this Court in *Reeves*. Specifically, *Hairston*, like *Reeves*, recognizes that disbelief of an employer's proffered reason, coupled with evidence already introduced to establish a *prima facie* case of discrimination, may be enough for a plaintiff to establish pretext. In addition, an evaluation of an employer's beliefs and perceptions regarding an employee's performance is a proper basis for a pretext analysis under *Reeves* as such an inquiry is designed specifically to answer the ultimate question in issue – that is, whether the plaintiff has proven that the employer purposefully discriminated or retaliated against the employee based on a protected ground. Accordingly, based on the foregoing, respondents respectfully pray that this Court denies petitioner's petition for a writ of certiorari.

Respectfully submitted,

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